No. 3077

IN THE 8

United States Circuit Court of Appeals

For the Ninth Circuit

HATTIE HARDESTY CHAPMAN,

Appellant,

vs.

R. M. SIMS, Trustee in Bankruptcy of The Realty Union, a Corporation, Bankrupt.

Appellee.

SUPPLEMENTAL BRIEF FOR APPELLEE

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No good purpose can be served by our repeating in this supplemental brief evidence which we have quoted or referred to in the BRIEF FOR APPELLEE. The appellant has now searched diligently through the pages of this evidence for something to show that appellee did not understand the nature of the deal she made and did not believe she was going into a common enterprise on an equal footing with others. A few quotations are set out, without reference to the balance of the testimony. The court is asked to infer from these quotations directly the contrary of what was inferred and found both by

the referee and by his Honor, Judge Rudkin, in the District Court. Judge Rudkin heard argument, had the entire record before him, and the briefs of the parties, and gave the case careful consideration. The referee and his Honor, Judge Rudkin, were in no way influenced by the tortuous testimony of the appellant. We proved that her agent was one Wallace; that this man knew all about the affairs of the Realty Syndicate upon which concern the Realty Union was patterned; that he knew all about the scheme and plan under which the Realty Syndicate had operated; that its certificate holders had in innumerable instances satisfied their demands with property as provided in their certificates;. that he knew of the plan under which the Realty Union operated, that he knew each company engaged in the practice of issuing investment certificates for thousands of dollars upon the assurance that real property would be acquired which would stand as security for all the promises contained in the investment certificates and upon the common understanding that the moneys and property received from the certificate holders would be invested and held and later sold for the certificate holders. That was the idea imparted by the words "Realty Union;" that was the idea imparted by the word "investment" or by the words "installment investment," and, as pointed out in the BRIEF FOR APPELLEE, Roosevelt Johnson, who was vice president of the Realty Union at the time Hattie Hardesty Chapman put her heavily encumbered and involved property into the concern, testified that he fully explained to appellee that by making the transfer and

accepting the certificates she would thereby become interested in the properties of the company generally. She knew this. "Adroitly" calling these investment certificates "promissory notes" cannot dissipate the effect produced both by the nature of the transaction and by the manner and substance of the testimony of the appellant herself.

The case was decided below upon the sufficient ground that the nature of the deal justified an inference against an intent to retain a vendor's lien. But no answer has been made to our argument that a contract that very materially secured payment and which was in addition to a bald promise to pay a debt, was taken from the Realty Union; no answer has been made to the argument that in the event the company, in accordance with its obligation implied from the entire transaction, proceeded to sell its properties it would be compelled to accept on account of the price investment certificates and this, whether they were or were not matured. It is simply evading the circumstances to say that the provisions referred to amounted to nothing, for the very face of the certificate shows, and the oral testimony shows, the transaction contemplated the sale of land of the company; that thereby profits were to be made and the "dividends" in excess of the agreed interest were to be ratably distributed between the stockholders and the investment certificate holders. It is not essential to the making out of a case that the personal obligation of the vendee only was not looked to, to show that the security or way provided for bringing about the settlement of a debt, was

absolutely bound to accomplish such settlement. If the vendor looks other than to the *personal* obligation of the vendee as a means for bringing about the settlement of the debt, the vendor's lien is not preserved; the provisions for the security may be feeble; they may be contingent and uncertain. Particularly if they are recognized by the parties as essential provisions of the contract, a vendor's lien is not preserved. This rule is thoroughly settled and is declared in no state more emphatically than in the State of California. The appelant simply asks this court to convert these investment certificates into promissory notes. They were not mere promissory notes. The express and implied obligations in them were material and they were regarded and ultimately treated as being material by the parties. They conferred a right to an accounting. A relationship was created by them. They were private "scrip." The fact that financial stringency or financial difficulties caused the collapse of the enterprise does not alter the situation. Had the concern gone forward and had the rise in prices in Alameda County been continuous and in accordance with the expectations of the parties organizing the company, the company would have kept going; it would, from time to time, have disposed of its lands in accordance with its promises and the certificate holders could have demanded such land on the sale thereof; they could have matured their certificates and brought about a settlement thereof forthwith. The vendor's lien is fragile; if security other than the personal obligation of the vendee enters into the transaction, the lien is gone.

The main point of both the referee's decision and of the opinion of Judge Rudkin is that the transaction viewed as an entirety justifies the inference that there was no intent to retain vendor's lien. It certainly would be remarkable if those who turned land into this company and took investment certificates could wait four or five years and then announce to the company that they had concluded to assert a vendor's lien upon particular property. It is impossible to assume that such was the expectation of a vendor turning his property into this concern and receiving investment certificates therefor. No such a conclusion is permissible under all the conditions of the transfer, and it is utterly negatived by the testimony of the appellant herself wherein she declares that she expected this company would proceed with the sale of the property and that it would fix its price in so doing, that she expected it was through sales just such as would be made of the property that she had turned in that she would be paid the excess interest or that profits would be made. The testimony of Mr. Johnson was that they talked over the nature of the business of this concern. The testimony of Mr. Wallace, the agent for the appellant, was that he was thoroughly familiar with the business of the concern. The "investors" were on an equal footing. They were "joint adventurers."

The circumstances of the transaction and the testimony of the appellant justify and require the inference that the surrender of the property was absolute. It was hopelessly encumbered. There were mortgages, deeds of trust,

second mortgages, street liens, and attachments upon it, and appellant doubtless welcomed the turning over of the property to the company. Wallace testified that he thought there was some sort of conspiracy among the banks in Oakland to thwart his efforts to save the property from sale. Both he and the appellant were only too willing to accept the contracts for the property. Mr. Wallace was honest enough to refuse to state that the company ever considered giving anything for this property excepting its investment certificates. It would not give straight promissory notes. It exacted and required and appellant knowingly accepted the condition that she become an investor in a common enterprise. Conditions change. The corner in question becomes more nearly desirable business property. The Realty Union is threatened with bankruptcy. She hastens to an attorney. This attorney after deliberately reading the investment certificates, (and not for the purpose of any compromise, as is perfectly obvious), goes to the company to find out whether its properties are listed for sale. The company is in a bad way financially. It declines to give a list. The situation is then studied and a suit to enforce a vendor's lien is instituted upon certificates that would not mature for seven years. It is the only claim of the kind asserted in the matter of this bankruptcy. It is an attempt to repudiate a contract made in a deal deliberately entered into by the agent of the appellant for the very purpose of saving something out of the property for the appellant; it is an attempt to eliminate every feature from the transaction except a promise to pay money.

Equity will not enforce an inequitable demand, and the demand in question is most inequitable. It is admitted in the supplemental brief filed for appellant that the records showed that investment certificates amounting to many thousands of dollars were issued after the transfer of the property. It is with bad grace that the appellant comes into court and attempts to take some little measure of relief from other certificate holders. She knew when she turned the land over to the company that it was valuing its property, issuing circulars, and disposing of its investment certificates as if it had the power to sell, and as if it was the absolute owner of the very land in question. Faith in the company's ownership of its properties was of course the basis upon which it disposed of the certificates. We have shown that where property is turned over to be used as the basis of an investment by others, no lien is retained.

It is law of California that the lien is not assignable.

> "The lien thus created is not a specific absolute charge upon real property; it is *personal* to the vendor, and does not pass by a transfer of his claim for the purchase money."
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> Gessner vs. Palmateer, 89 Cal., 92
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> "Indeed, with the exception of decisions in two or three states, the adjudged cases are uniformly against any assignment of the lien by a transfer of the note or other personal security of the vendee. * * * * * The cases which deny that the lien passes with the personal security of the vendee do not rest except in a few cases upon the want of a special assignment from the vendor, **but upon the ground that the lien is in its nature inassignable**; and to that conclusion

> we have arrived * * * * *. The assignee of a note given for the purchase money stands in a very different position. He has not parted with the property which he seeks to reach * * * * *. It is indispensably necessary, says Chancellor Blood, to the existence of such a lien, that the parties should stand in the relation to each other of vendor and vendee of real estate * * * * *. If the relationship is in any manner whatever put off, altered, or relinquished, an equitable lien either cannot arise, or will be destroyed," etc.
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> Baum vs. Grigsby, 21 Cal., 176, 177.

It is conceded that title to the northerly portion of the property never vested in the appellant. It would take a deed, contract in writing, to do that. Wallace turned his property in with property that belonged to the appellant. It was all one transaction. The Wallace lot did not extend entirely to the rear of the whole lot. The lien is unassignable. It is allowed solely as a protection to a vendor. If it is unassignable, it is a departure from the law and a circumvention of the law to allow it in favor of one to whom the vendee promises to pay the purchase price at the instance of the vendor. Such a person is not a vendor. The transaction amounts to nothing more than an indirect assignment of the lien. The lien being unassignable, no lien could attach to the property which Wallace turned over and it further results in view of the fact that the transaction was entire, and there was no apportionment of the price so that a part of it could be said to appertain to the lot in the northwest corner of the main lot, that no lien at all could exist. This we mentioned at the oral argument and we renew the contention

here. The point made is similar to the point that where the price covers real and personal property and there is no apportionment no lien upon the land can be preserved.

> Welch vs. Farmers' Loan and Trust Co., 165 Fed., 561-565.

Respectfully submitted,

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